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No. 04-1264

IN THE

Supreme Court of the United States

BUCKEYE CHECK CASHING, INC.,

Petitioner,

v.

JOHN CARDEGNA, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE AMERICAN FINANCIAL SERVICES ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation, representing an underlying membership of more than three million businesses, state and local chambers of commerce, and professional organizations. Chamber members operate in every sector of the economy and transact business throughout the United States. A central

[1] Letters of consent from both parties have been filed with the Clerk of the Court. Pursuant to Rule 37.6, *amici* state that no counsel for a party authored any part of this brief, and no person or entity other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

function of the Chamber is to represent the interests of its members in important matters before the courts, Congress, and the Executive Branch. To that end, the Chamber has filed *amicus curiae* briefs in numerous cases that have raised issues of vital concern to the nation's business community. For example, the Chamber has previously filed briefs concerning arbitration issues before this Court in *Green Tree Financial Corp.* v. *Bazzle*, 539 U.S. 444 (2003), and *PacifiCare Health Systems, Inc.* v. *Book*, 538 U.S. 401 (2003).

The American Financial Services Association ("AFSA") was organized in 1916 and represents more than 300 companies that engage in lending and sales financing amounting to approximately twenty percent of all consumer credit in the United States. These companies range from independently-owned consumer finance firms to the nation's largest financial services, retail, and automobile sales finance companies. AFSA's membership includes national and state banks that operate multi-state consumer credit programs. Like the Chamber, AFSA represents the interests of its members in cases of importance to its members, and has filed amicus briefs in a number of cases involving arbitration issues, including *Bazzle*, 539 U.S. 444, and *Green Tree Financial Corp.-Alabama* v. *Randolph*, 531 U.S. 79 (2000).

Many of the members, constituent organizations, and affiliates of the Chamber and AFSA have adopted, as standard features of their business contracts, provisions that provide for the arbitration of disputes arising from or related to such contracts. They use arbitration because it is a fast, fair, and inexpensive method of resolving disputes with consumers and other contracting parties. Because the Chamber and AFSA members who utilize arbitration agreements may be sued in a wide range of state and federal courts, they rely on the protection afforded by the Federal Arbitration Act to ensure that their arbitration agreements are enforced consistently.

SUMMARY OF THE ARGUMENT

The only question in this case is whether a court or an arbitrator should resolve an allegation that a contract is void for illegality when that contract contains an arbitration provision. This Court answered that question in *Prima Paint Corp.* v. *Flood & Conklin Manufacturing Co.*, 388 U.S. 395 (1967). Quoting the Federal Arbitration Act ("FAA"), the *Prima Paint* Court found that the arbitrator should resolve contractual issues as long as "'the making of the agreement for arbitration'" was not at issue. *Id.* at 403 (quoting 9 U.S.C. § 4).

In this case, the Florida Supreme Court failed to follow *Prima Paint*. Instead, it held that an allegation that a contract is void (rather than voidable) should always be heard by a court—even when the parties unquestionably agreed to arbitrate any disputes. This effort to redraw the line between litigation and arbitration conflicts with *Prima Paint* in at least three ways. First, it is circular: it assumes that plaintiffs will prove the contract is void in order to justify litigation of the claim the contract is void. Second, the void/voidable distinction conflicts with the analysis required under *Prima Paint* when applied to claims that a contract is void because a particular contractual provision is illegal. Third, the Florida Supreme Court's approach improperly exalts state-law considerations over the federal substantive law governing arbitrability.

The ruling below also conflicts with the purposes of the FAA by slowing enforcement of arbitration agreements when the FAA seeks to "move the parties . . . into arbitration as quickly and easily as possible." *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 22 (1983). As the dissent below pointed out (Pet. App. 23a), it evidences "a basic mistrust of arbitration," at odds with the "liberal federal policy favoring arbitration agreements." *Moses H. Cone*, 460 U.S. at 24. And the reliance on state-law distinctions between void and voidable contracts introduces substantial uncertainty and variability for

businesses that rely upon the FAA to ensure the consistent enforcement of arbitration agreements.

ARGUMENT

I. *PRIMA PAINT* REQUIRES ENFORCEMENT OF ARBITRATION AGREEMENTS UNLESS THE MAKING OF THE ARBITRATION AGREEMENT IS CHALLENGED

This case centers on the question of whether a court should enforce an arbitration provision when a party claims the contract in which the provision is found is void. While most contractual provisions may be enforced (or not) *after* the resolution of claims that the contract is void, an arbitration provision can have its intended effect only if enforced *prior* to such a resolution. This timing problem means that a decision about the enforceability of an arbitration provision cannot rest upon the resolution of the voidness claim, but instead requires a policy choice about when arbitration provisions should be enforced.

Through the FAA, "Congress has provided an explicit answer" to this policy question. *Prima Paint*, 388 U.S. at 403. The FAA requires that a court "order arbitration to proceed once it is satisfied that 'the making of the agreement for arbitration or the failure to comply [with the arbitration agreement] is not in issue.'" *Id.* (quoting 9 U.S.C. § 4) (alteration in original). Accordingly, "an issue which goes to the 'making' of the agreement to arbitrate," *id.*, such as forgery or lack of authority to enter into the arbitration agreement, may be adjudicated by the court. All other claims must be arbitrated. *See id.* at 403-404. As this Court explained in *Prima Paint*, "in so concluding, we not only honor the plain meaning of the statute but also the unmistakably clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts." *Id.* at 404.

Applying the FAA to the fraud claim before it, the Court in *Prima Paint* concluded that a court should hear a claim of fraud "in the inducement of the arbitration clause

itself," but not "claims of fraud in the inducement of the contract generally." 388 U.S. at 404. In drawing this distinction, the Court adopted the view, expressed in a prior decision of the Second Circuit, that "arbitration clauses as a matter of federal law are separable from the contracts in which they are embedded." *Id.* at 402 (citing *Robert Lawrence Co.* v. *Devonshire Fabrics, Inc.*, 271 F.2d 402 (2d Cir. 1959)); *see also id.* at 422 (Black, J., dissenting) (noting that the Court accepted the Second Circuit's reasoning). This severability doctrine allows the arbitration provision to rise or fall independently from any challenge to the rest of the contract.[2]

II. THE FLORIDA SUPREME COURT'S DECISION IS INCONSISTENT WITH *PRIMA PAINT*

In this case, the Florida Supreme Court rejected the policy choice made by Congress and explicated in *Prima Paint*. While *Prima Paint* explains that a court's inquiry is limited to issues "relating to the making and performance of the agreement to arbitrate," 388 U.S. at 404, the Florida Supreme Court chose to draw a different line, holding (Pet. App. 7a) that while an arbitrator may decide claims that the underlying contract is *voidable* under state law, a court should decide claims that the contract is *void ab initio*. That holding suffers from at least three flaws. First, it is circular: it assumes that plaintiffs will prove the contract is void in order to justify litigation of the claim that the contract is void. Second, the void/voidable distinction conflicts with *Prima Paint* when applied to claims that a particular contract provision is illegal. Third, it improperly exalts

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[2] *Prima Paint*'s severability rule also ensures that the enforceability of arbitration clauses does not depend on whether contracting parties choose to memorialize their agreements in one document or two. Instead, it treats the agreement as consisting of two documents, and only challenges that implicate the making of the arbitration provision are to be adjudicated by the courts. *See* 388 U.S. at 402-403; *cf. Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 278 (1995) (arbitrability should not turn on "happenstance" in the drafting of an agreement).

state-law considerations over the federal substantive law governing arbitrability.

A. The Florida Supreme Court Improperly Assumed Plaintiffs Would Prove That The Contract Was Void

Perhaps the best indication that the Florida Supreme Court's analysis cannot be reconciled with *Prima Paint* is its striking resemblance to the *dissent* in *Prima Paint*. The Florida Supreme Court grounded its ruling on the explanation that "if the underlying contract is held entirely void . . . all of its provisions, including the arbitration clause, would be nullified as well." Pet. App. 6a. That is the same argument Justice Black made in support of his dissenting view that fraudulent inducement challenges to a contract as a whole should be decided by courts: "[i]f the contract was procured by fraud, then, unless the defrauded party elects to affirm it, there is absolutely no contract, nothing to be arbitrated." 388 U.S. at 412 (Black, J., dissenting).

The flaw in such reasoning is that it jumps directly from the premise that litigation (and not arbitration) would be appropriate "*if* the underlying contract is held entirely void" (Pet. App. 6a (emphasis supplied)), to the conclusion that litigation is appropriate for all *claims* that a contract is void (Pet. App. 7a).[3] But that inferential leap requires either the insupportable assumptions that a plaintiff will prove his claim and that a void contract cannot include a valid arbitration provision, *see Harter* v. *Iowa Grain Co.*, 220 F.3d 544, 551 (7th Cir. 2000) (criticizing this approach); *Lawrence* v. *Comprehensive Business Services Co.*, 833 F.2d 1159, 1162 (5th Cir. 1987) (same), or a judgment that uncertainty in this context should be resolved against arbitration, and in favor of litigation. Such a judgment would reflect a policy choice fundamentally different than the one made by the FAA and reflected in *Prima Paint*.

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[3] The *Prima Paint* dissent similarly reasoned that litigation is appropriate "[i]f the contract was procured by fraud," and so all *claims* that a contract was procured by fraud must be litigated. 388 U.S. at 425.

B. The Distinction Between "Void" And "Voidable" Contracts Does Not Comport With *Prima Paint*

By permitting a court to withhold arbitration whenever a plaintiff claims that the entire contract is void rather than voidable, the Florida Supreme Court distorted the *Prima Paint* principle that arbitration should be ordered whenever the "making of the agreement for arbitration" is not at issue. That is so because the state-law concepts of "void" and "voidable" contracts do not always align with the analysis of whether a particular dispute raises an issue "relating to the making" of an arbitration agreement. 388 U.S. at 404. The term "void contract" is generally defined as "[a] contract that is of no legal effect, so that there is really no contract in existence at all."[4] This concept encompasses not only situations in which a requirement for the creation of a contract (such as assent) is absent, but also situations in which the parties reach an agreement, but that agreement is unenforceable because the law disapproves of its purpose or the terms by which it seeks to achieve such purpose.[5] In those latter situations, when the claim of voidness "challenges the *content* of the contracts, not their *existence*," the void/voidness standard reaches the wrong result under *Prima Paint*. *Bess* v. *Check Express*, 294 F.3d 1298, 1305 (11th Cir. 2002).

The conflict between *Prima Paint* and the void/voidness approach has been obscured by the fact that these two different standards yield the same result when the claim of voidness reaches "the making of the agreement for

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[4] *Black's Law Dictionary* 350 (8th ed. 2004). In contrast, a "voidable contract" is generally defined as "[a] contract that can be affirmed or rejected at the option of one of the parties; a contract that is void as to the wrongdoer but not void as to the party wronged, unless that party elects to treat it as void." *Id.*

[5] *See generally Restatement (Second) of Contracts*, § 7 & cmt. a (1981); Joseph M. Perillo, 1 *Corbin on Contracts*, §§ 1.6, 1.7 (Yale Univ. 1993); Joseph M. Perillo, *Calamari & Perillo on Contracts* §§ 1.8, 22.1 (5th ed. 2003).

arbitration." For example, a claim by a plaintiff that she did not sign a contract is a "voidness" claim, but one that relates with equal force to every provision in the contract, including any arbitration provision. This coincidence reconciles *Prima Paint* and the holdings in a line of federal court of appeals cases that allow a court to hear claims that a contract is void due to a lack of assent. *See, e.g., Three Valleys Municipal Water District* v. *E.F. Hutton & Co.*, 925 F.2d 1136 (9th Cir. 1991) (involving a claim that the signatory lacked the authority to bind another).[6]

The problem with those federal cases is that they routinely assert that *Prima Paint* was "limited to challenges seeking to *avoid* or *rescind* a contract—not to challenges going to the very existence of a contract that a party claims never to have agreed to," and that "*Prima Paint* applies [only] to 'voidable' contracts." 925 F.2d at 1140. That dicta has been applied by state courts, in cases like the one at bar, in which the voidness challenge does not reach the arbitration agreement itself, but is instead based on a state-law claim about a particular provision of the contract.[7] As every federal appeals court to consider the issue has found, application of the void/voidable distinction to deny arbitration in that context conflicts with *Prima Paint*

[6] The decisions in accord with *Three Valleys* all involved claims that a party did not assent to the contract. *See, e.g., Sphere Drake Ins.* v. *Clarendon Nat'l Ins. Co.*, 263 F.3d 26, 32 (2d Cir. 2001) (agent allegedly acted outside scope of authority); *Sandvik AB* v. *Advent Int'l Corp.*, 220 F.3d 99, 106-107 (3d Cir. 2000) (contract was allegedly signed by an unauthorized individual); *Chastain* v. *Robinson Humphrey Co.*, 957 F.2d 851, 853, 855 (11th Cir. 1992) (defendant conceded that actual author of plaintiff's signature could not be ascertained).

[7] *See, e.g.*, Pet. App. 6a-7a (alleged violation of state usury statute); *Alabama Catalog Sales* v. *Harris*, 794 So. 2d 312, 314 (Ala. 2000) (alleged violation of usury law); *R.P.T. of Aspen, Inc.* v. *Innovative Communs., Inc.*, 917 P.2d 340, 342 (Colo. Ct. App. 1996) (alleged violation of state antitrust law); *Onvoy, Inc.* v. *Shal, LLC*, 669 N.W.2d 344, 352-354 (Minn. 2003) (alleged violation of state law concerning transactions approved by interested directors); *Nature's 10 Jewelers* v. *Gunderson*, 648 N.W.2d 804, 807 (S.D. 2002) (alleged violation of franchise registration statute).

because it permits a court to hear claims that do not reach the making of the arbitration agreement. *See Jenkins* v. *First Am. Cash Advance of Ga., LLC*, 400 F.3d 868, 880-882 (11th Cir. 2005); *Bess*, 294 F.3d at 1304-1306; *Snowden* v. *CheckPoint Check Cashing*, 290 F.3d 631, 636-638 (4th Cir. 2002); *Burden* v. *Check Into Cash of Ky., LLC*, 267 F.3d 483, 488-492 (6th Cir. 2001); *Harter*, 220 F.3d at 550-551; *Lawrence*, 833 F.2d at 1161-1162; *see also Dewey* v. *Wegner*, 138 S.W.3d 591, 597-602 (Tex. App. 2004); Pet. App. 23a (Cantero, J., dissenting).

C. The Florida Supreme Court Erred In Basing Arbitrability On State Law

In concluding that a voidness claim must be adjudicated by a court, the Florida Supreme Court explained that "Florida public policy and contract law prohibit breathing life into a potentially illegal contract by enforcing the included arbitration clause of the void contract" and "there are no severable, or salvageable, parts of a contract found illegal and void under Florida law." Pet. App. 7a-8a. This invocation of state law and policy to block arbitration is inconsistent with *Prima Paint*'s determination that the issue of arbitrability is one of "federal substantive law." *Moses H. Cone*, 460 U.S. at 24 (describing *Prima Paint*).

Indeed, *Prima Paint* itself rejected an earlier court of appeals decision holding that severability of arbitration clauses should be governed by state law. 388 U.S. at 402-403 (discussing *Lummus Co.* v. *Commonwealth Oil Ref. Co.*, 280 F.2d 915 (1st Cir. 1960)); *see also* 388 U.S. at 404-406 (holding that the FAA is an exercise of Congress's Commerce Clause powers and must be applied by federal courts even in diversity jurisdiction cases). Any state law or public policy that prevents arbitration where the FAA requires otherwise is preempted under the Supremacy Clause. *See, e.g., Doctor's Assocs., Inc.* v. *Casarotto*, 517 U.S. 681, 683 (1996) (states may not impose special notice requirements on arbitration agreements); *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57-58 (1995) (arbitration agreement allowing for punitive damages

overrides state law permitting only courts to issue punitive damages awards); *Southland Corp.* v. *Keating*, 465 U.S. 1, 12-15 (1984) (prohibiting a State from requiring judicial forum for certain claims).[8]

III. THE FLORIDA SUPREME COURT'S VOID/VOIDABLE DISTINCTION UNDERMINES THE FAA

By requiring litigation, rather than arbitration, whenever a plaintiff alleges that a contract is void, the Florida Supreme Court's decision undermines the "liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." *Moses H. Cone*, 460 U.S. at 24-25. "[A]s a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Id.* Whereas the rule articulated by the Florida Supreme Court precludes arbitration even when the agreement to arbitrate itself is not challenged, the FAA requires that "the parties' intentions . . . are generously construed as to issues of arbitrability." *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985).

The rule established by the Florida Supreme Court stalls arbitration until after litigation on the merits of a contractual claim. This approach is at odds with "Congress's clear intent, in the Arbitration Act, to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible." *Moses H. Cone*, 460 U.S. at 22. In keeping with the FAA, this Court has refused to allow allegations regarding arbitration costs or biases to prevent

[8] *Southland* addressed a state statute that the California Supreme Court read to invalidate arbitration provisions in franchise agreements. *See* Cal. Corp. Code § 31512 (West 1977) ("Any condition, stipulation, or provision purporting to bind any person acquiring any franchise to waive compliance with any provision of this law or any rule hereunder is void." (quoted in *Southland Corp.* v. *Keating*, 465 U.S. 1, 19 (1984))).

enforcement of an arbitration provision. *See Randolph*, 531 U.S. at 90-91 (costs); *Mitsubishi Motors*, 473 U.S. at 634 (bias). These and many other decisions by this Court recognize that a rule that requires substantial pre-arbitration litigation "risks the very kind of costs and delay through litigation that Congress wrote the Act to help the parties avoid." *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 275 (1995); *see also Southland*, 465 U.S. at 7 (prolonged litigation is "one of the very risks the parties, by contracting for arbitration, sought to eliminate"); *Prima Paint*, 388 U.S. at 404 ("the arbitration procedure, when selected by the parties to a contract, [should] be speedy and not subject to delay and obstruction in the courts").

Moreover, the Florida Supreme Court's opinion "evinces a basic distrust of arbitration and places the court as jealous guardian of the determination of legal issues." Pet. App. 26a (Cantero, J. dissenting). This judicial skepticism toward arbitration is at odds with a now-long line of FAA decisions by this Court rejecting "'suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants.'" *Randolph*, 531 U.S. at 89-90 (citation omitted); *see also Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (cataloguing previous cases that recognize "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial forum" (citation omitted)).

A. Forum-Selection Precedents Reinforce The FAA Mandate

As this Court has often observed, "an agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause." *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506, 519 (1974).[9] Such clauses present the same

[9] *See also Vimar Seguros y Reaseguros, S.A.* v. *M/V Sky Reefer*, 515 U.S. 528, 534 (1995) ("arbitration clauses are but a subset of . . . forum

sort of timing problem as arbitration clauses, as a court must decide whether to enforce the parties' forum-selection provision before it knows whether the underlying contract is enforceable. It is therefore illuminating to note that forum-selection clauses are enforced even when a party claims that the entire contract is void.

As with arbitration clauses, there is a strong presumption in favor of enforcing forum-selection clauses. *Compare M/S Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1, 10 (1972) (under federal common law, forum-selection clauses "are *prima facie* valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances") *with Moses H. Cone*, 460 U.S. at 244-245 ("doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration"). Thus, courts have consistently held that a forum-selection clause is enforceable unless there is a claim that the clause *itself* was fraudulently induced.[10] Courts have been unpersuaded by claims that a forum-selection clause should be invalidated because a contract violates public policy.[11] Courts have *not* sought to carve out an exception that allows them to ignore a forum-selection clause whenever a party claims that the contract is void.[12]

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selection clauses in general"); *Mitsubishi Motors Corp.*, 473 U.S. at 629-630 ("[i]dentical considerations" govern disputes regarding forum-selection and arbitration).

[10] *See, e.g., Afram Carriers, Inc.* v. *Moeykens*, 145 F.3d 298, 302 (5th Cir. 1998); *REO Sales, Inc.* v. *Prudential Ins. Co. of Am.*, 925 F. Supp. 1491, 1493-1495 (D. Colo. 1996); *Picken* v. *Minuteman Press Int'l, Inc.*, 854 F. Supp. 909, 911-912 (N.D. Ga. 1993); *D'Antuono* v. *CCH Computax Sys., Inc.*, 570 F. Supp. 708, 714 (D.R.I. 1983); *see also Scherk*, 417 U.S. at 519 n.14 (observing that a forum-selection clause is unenforceable only if "the inclusion of *that clause* in the contract was the product of fraud or coercion" (emphasis added)).

[11] *See, e.g., Shell* v. *R.W. Sturge*, 55 F.3d 1227, 1231 (6th Cir. 1995); *D'Antuono*, 570 F. Supp. at 714.

[12] *See Shell*, 55 F.3d at 1232 (rejecting claim that trial court should have considered whether contract was void under Ohio securities registration law before applying forum-selection clause); *Grand Central Sanitary Landfill, Inc.* v. *C-E Huntington Ltd. P'ship*, No. Civ-A95-0056, 1995 WL 92377, at *2 (E.D. Pa. Mar. 1, 1995) (rejecting argument that failure to obtain required environmental permits rendered contract and forum-selection clause void); *Murray* v. *Maxus, Inc.*, No. Civ.-A-3:95CV18-A, 1995 WL 1945545, at *2 n.5 (N.D. Miss. Nov. 13, 1995) (rejecting argument that alleged violation of Mississippi contract bidding statute voided contract and prevented enforcement of forum-selection clause).

Just as courts have been willing to trust foreign fora to handle voidness claims, the FAA requires that they trust arbitrators. *See* 9 U.S.C. § 2; *Doctor's Assocs.*, 517 U.S. at 687 (Through the FAA, "Congress precluded States from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed "upon the same footing as other contracts." (citation omitted)). Indeed, the practical concerns that underlie the forum-selection clause decisions apply with equal force to arbitration provisions. As one court explained:

> If a forum clause were to be rejected whenever a plaintiff asserted a generic claim of fraud in the inducement . . . then forum clauses would be rendered essentially meaningless. That is, whenever a plaintiff had a breach of contract claim, it could defeat an otherwise clear, detailed, and comprehensive forum selection clause by simply alleging fraud as well. Such a holding would denigrate the Supreme Court's overriding mantra . . . that forum selection clauses should not be dismissed lightly.

REO Sales, Inc. v. *Prudential Ins. Co. of Am.*, 925 F. Supp. 1491, 1495 (D. Colo. 1996). This reasoning applies with the same force to the risk, enhanced by decisions like the one in this case, that parties will make voidness claims in order to evade an agreement to arbitrate.

B. Application Of State Voidness Doctrines Will Hinder Enforcement Of Arbitration Agreements

Claims that a contract is void may be brought in a broad range of contractual settings involving a wide variety of regulatory and licensing statutes. A contract may be challenged as void through allegations that it: (1) involves the commission of a crime or tort; (2) involves the violation of a state statute that provides that contravening contracts are void; (3) conflicts with regulatory or administrative statutes; or (4) is otherwise contrary to public policy. *See generally* Joseph M. Perillo, *Calamari & Perillo on Contracts*, § 22.1 (5th ed. 2003); *Restatement (Second) of Contracts* § 194 (1981). As a result, voidness claims relating to contracts that include arbitration clauses have arisen in fields as disparate as construction, telecommunications, energy, franchising, securities, casino development, tax shelters, railroad indemnification, insurance and corporate acquisitions.[13] These claims rely on a wide array of voidness theories and are grounded in disparate state and federal laws.[14] Such claims will quickly multiply if the ruling of the

[13] *John B. Goodman Ltd. P'ship* v. *THF Constr., Inc.*, 321 F.3d 1094, 1096-1097 (11th Cir. 2003) (construction contract); *Mesa Operating Ltd. P'ship* v. *Louisiana Intrastate Gas Corp.*, 797 F.2d 238, 244 (5th Cir. 1986) (contract to purchase gas); *Nature's 10 Jewelers*, 648 N.W.2d at 805 (franchise agreement); *Fazio* v. *Lehman Bros., Inc.*, 340 F.3d 386, 394-395 (6th Cir. 2003) (securities brokerage agreement); *R.P.T. of Aspen*, 917 P.2d at 342 (mobile phone marketing agreement); *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians* v. *Kean-Argovitz Resorts*, 383 F.3d 512, 514 (6th Cir. 2004) (casino and resort development partnership); *Denney* v. *BDO Seidman, L.L.P.*, 412 F.3d 58, 63 (2d Cir. 2005) (tax consulting agreement); *National R.R. Passenger Corp.* v. *Consolidated Rail Corp.*, 892 F.2d 1066, 1067 (D.C. Cir. 1990) (railroad indemnification agreement); *Home Quality Mgmt., Inc.* v. *Ace Am. Ins. Co.*, — F. Supp. 2d —, 2005 WL 1607885, at *2 (S.D. Fla. July 1, 2005) (insurance policy); *Medtronic, Inc.* v. *ETEX Corp.*, No. Civ. 04-1355 ADM/AJB, 2004 WL 950284, at *1 (D. Minn. Apr. 12, 2004) (corporate purchase and option agreement).

[14] *See, e.g., John B. Goodman Ltd. P'ship*, 321 F.3d at 1095 (Florida contractor licensing laws); *Mesa Operating Ltd. P'ship*, 797 F.2d at 244 (Louisiana public bidding rules); *Nature's 10 Jewelers*, 648 N.W.2d at 807

Florida Supreme Court is not reversed, and the resulting proliferation of pre-arbitration litigation would burden arbitration in derogation of the purposes of the FAA.[15]

Moreover, the principles governing voidness claims are uncertain and complex. *See, e.g., Restatement (Second) of Contracts* § 194 (analysis of claims that contracts are void as contrary to public policy requires multi-step balancing test); 6 Richard A. Lord, *Williston on Contracts*, § 12.4 (4th ed. 1995). Any rule inviting litigation of such claims before enforcement of an arbitration clause entails "the very kind of costs and delay . . . that Congress wrote the [Federal Arbitration] Act to help the parties avoid." *Allied-Bruce Terminix*, 513 U.S. at 278.

Application of the distinction between void and voidable contracts will also make the enforceability of particular arbitration clauses depend on which State a challenge is brought in, since the various States have conflicting approaches on whether particular claims render a contract void or merely voidable. For example, a claim that a national mortgage lender made usurious mortgage loans would make the loans void and unenforceable in New York,

(South Dakota franchise registration laws); *Fazio*, 340 F.3d at 391 (federal securities laws); *R.P.T. of Aspen*, 917 P.2d at 342 (Colorado antitrust statute); *Match-E-Be-Nash-She-Wish Band*, 383 F.3d at 514 (federal regulations governing Indian gaming); and *National R.R. Passenger Corp.*, 892 F.2d at 1069 (general public policy concerns).

[15] The persistence of attacks on arbitration strongly suggests that any rule that allows a party to sidestep arbitration will become a commonplace litigation strategy. For example, the FAA allows unconscionability challenges to arbitration agreements in court because such challenges are generally applicable to any contract. *See* 9 U.S.C. § 2. However, now *most* unconscionability cases involve arbitration agreements. *See* Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*, 52 Buff. L. Rev. 185, 194-196 (2004) (finding that the total number of unconscionability cases available through computerized searches jumped from 54 in 1982-1983 to 235 in 2002-2003 and that nearly 70% of the recent cases involved claims that arbitration agreements were unconscionable compared to fewer than 15% of claims 20 years ago).

but would only require the forfeiture of excess interest in North Carolina.[16] A claim that a home contractor was not licensed would make the relevant contract void in New Mexico, but potentially only voidable in Arizona.[17] Similarly, a claim that a commercial lease is contrary to zoning laws is a voidness claim in the District of Columbia, but makes the contract neither void nor voidable in Ohio.[18]

State-by-state variation in the enforceability of arbitration agreements is at odds with the FAA, which anticipates that arbitration agreements will be equally enforceable nationwide. *See Southland*, 465 U.S. at 15 ("We are unwilling to attribute to Congress the intent, in drawing on the comprehensive powers of the Commerce Clause, to create a right to enforce an arbitration contract and yet make the right dependent for its enforcement on the particular forum in which it is asserted."). Such variability would substantially impede the ability of national businesses to rely upon the consistent enforcement of arbitration agreements.

CONCLUSION

For the foregoing reasons, the judgment of the Florida Supreme Court should be reversed.

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[16] *Compare Southern Fin. Group, Inc.* v. *Collins*, 775 N.Y.S.2d 161, 162 (N.Y. App. Div. 2004) *with Swindell* v. *Federal Nat'l Mortg. Ass'n*, 409 S.E.2d 892, 893 (N.C. 1991).

[17] *Compare Gamboa* v. *Urena*, 90 P.3d 534, 537 (N.M. Ct. App. 2004) ("contracts entered into by unlicensed contractors are contrary to public policy and unenforceable"), *cert. denied*, 92 P.3d 10 (N.M. 2004), *with Bentivegna* v. *Powers Steel & Wire Prods., Inc.*, 81 P.3d 1040, 1046 (Ariz. Ct. App. 2004) ("Thus, even unlicensed contractors are not automatically barred from bringing an action for amounts due.").

[18] *Compare McMahon* v. *Anderson, Hibby & Blair*, 728 A.2d 656, 659 (D.C. 1999) *with Truetried Serv. Co.* v. *Hager*, 691 N.E.2d 1112, 1118 (Ohio Ct. App. 1997).

Respectfully submitted.

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